A

Teoh Kok Seng v Heesland Sdn Bhd & Anor

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-01(A)-44–01 OF 2022
YAACOB MD SAM, SUPANG LIAN AND AZIMAH OMAR JJCA
18 MAY 2023

C *Administrative Law — Judicial review — Application for — The Tribunal for Homebuyers Claims imposed late payment interest against purchaser for delay in disbursement of loan by financier — Purchaser filed judicial review against award — High Court judge dismissed judicial review application — Whether delay not attributable to purchaser — Whether tribunal and High Court judge failed to*
D *appreciate that delay was caused by developer's lawyers — Whether High Court judge was wrong in failing to find that tribunal's award was irrational for blaming delay against appellant — Whether High Court judge's analysis and reliance upon 'without prejudice' correspondence were unlawful or illegal — Whether High Court judge was wrong in failing to find that tribunal's award was procedurally*
E *improper in view of pre-maturity of late payment interest claim*

The appellant had purchased a double-storey house from the developer ('the first respondent') via a sale and purchase agreement ('the SPA') and to part-finance the purchase of the house, the appellant had obtained a loan from
F RHB Bank ('the financier'). The financier had issued a letter of notification on 18 April 2017, but the developer's lawyers, Messrs Ong and Partners had only prepared the loan documents on 2 May 2017. On the same day, the developer issued its progress billing for the disbursement of RM530,000 to the financier, which allegedly falls due on 26 May 2017. The developer's lawyers had
G submitted the loan documentation for execution to the financier on 12 May 2017, but the financier refused to execute the loan documents and returned the same to the developer's lawyers because the developer's lawyers had given an 'expired' land search to the financier. The developer's lawyers had only managed to submit the appropriate land search on 26 May 2017 and by that
H time, the disbursement of the loan could not have been made within the time set by the developer. The developer brought the matter to the Tribunal for Homebuyers Claims ('the second respondent') to claim late payment interest ('LPI') against the appellant for the delay in the disbursement of the loan by the financier for the first progress billing issued by the developer. The second
I respondent found in favour of the developer and imposed LPI against the appellant ('the award'). Aggrieved by the award, the appellant had filed a judicial review application but the High Court had dismissed the said application on the following grounds: (a) the appellant had admitted to the delay of disbursement because he had only blamed others for the delay; (b) the

appellant was equally responsible to ensure the financier released the loan sum within time because the developer's progress billing was copied to the appellant; (c) the developer's claim for LPI remained valid despite the short notice of only 18 days' notice period (instead of the SPA's 21 days' notice period requirement to claim LPI); and (d) the matter could have been negotiated for settlement if not for the appellant's unreasonable refusal to sign a waiver and settlement to allow the financier to absorb the LPI ('the negotiated settlement'). Dissatisfied with the High Court's decision, the appellant filed the present appeal.

Held, allowing the appeal, and setting aside the High Court's decision and the second respondent's award with costs of RM7,000 here and below subject to allocator, to be paid by the first respondent to the appellant:

(1) As a general rule, the courts ought not to usurp or encroach the jurisdiction of any tribunal and dive into the substance or merits of a tribunal's decision. And this limitation should be observed with the highest degree of vigilance and restraint. Nonetheless, a challenge on substance (subject to the limitation of any specific statute or provision and the factual matrix of a given case) may still be mounted if the decision's errors were sufficiently profound to be either illegal, irrational (or unreasonable), procedurally improper, or disproportionate. In the present case, the court found that the learned High Court judge's decision had indeed fallen into error in not finding the obvious irrationality, illegality, and procedural impropriety of the second respondent's impugned award. The court further identified that the learned judge's analysis had strayed away from, and unfortunately missed the true essence of the dispute. The learned judge had also wrongfully considered 'without prejudice' documents which were illegal to be considered in making a decision (see paras 20 & 22).

(2) The court found that neither the learned judge nor the second respondent ever embarked on any meaningful fact finding and analysis on the representative capacity of the developer's lawyer who was obviously acting for the developer and not the appellant nor the financier. Further, the learned judge and the second respondent had fallen into irrationality in not embarking on any meaningful deliberation and analysis of the process and procedures of the loan documentation which had led to the delay occasioned by the developer's lawyers. In addition, by agency, the developer's lawyers' delays were also the developer's delays as principal. Therefore, the developer's lawyers' delay in preparing the loan documentation was also attributable to the developer itself and it was irrational for the developer to impose LPI against the appellant for the delay that the developer itself (and the developer's lawyers) had caused. The court found that no sensible person having the knowledge of the above facts and issues, would ever find that the appellant was at fault for

the delays occasioned or caused by the developer's lawyers and the developer itself. In failing to make the same finding and observation, the learned judge's decision and the second respondent's impugned award were certainly irrational (see paras 24, 26, 28 & 32–34).

(3) The learned judge's finding and consideration of the negotiated settlement clearly contravened the trite law against raising and referring to documents regarding 'without prejudice' negotiations for settlement. The learned judge had failed to appropriately appreciate and uphold the law on the inadmissibility of 'without prejudice' documents. In any event, it would be severely unjust and unreasonable to insist upon the appellant to sign a blanket waiver to waive all other claims he might have against the developer and developer's lawyers just so that the bank would absorb the LPI that was incurred due to the developer's and developer's lawyers' delays (see paras 36–38).

(4) The learned judge observed that the developer's demand for LPI indeed did not comply with the requirement for 21 working days' notice period (from the date of the receipt of the progress billing) for the developer to demand for LPI. However, the learned judge never embarked on a substantive evaluation of the effect of such premature demand and insufficiency of notice period under a contract. Premature demand could mean that the LPI claim was based off of a defective demand or claim. Neither the learned judge nor the second respondent discussed the possible procedural propriety of the LPI demand. The court found that the learned judge's decision and the second respondent's impugned award had fallen into an appealable error considering that the entire critical discourse of the procedural propriety of the LPI demand was absent in the learned judge's grounds of judgment and the second respondent's impugned award (see paras 40–42).

[Bahasa Malaysia summary

Perayu telah membeli sebuah rumah dua tingkat daripada pemaju ('responden pertama') melalui perjanjian jual beli ('PJB') dan untuk membiayai sebahagian pembelian rumah tersebut, perayu telah mendapatkan pinjaman daripada RHB Bank ('pembiaya'). Pembiaya telah mengeluarkan surat pemberitahuan pada 18 April 2017, tetapi peguam pemaju, Tetuan Ong and Partners hanya menyediakan dokumen pinjaman pada 2 Mei 2017. Pada hari yang sama, pemaju menyerahkan bil kemajuannya untuk pengeluaran jumlah RM530,000 kepada pembiaya, yang dikatakan perlu dibayar pada 26 Mei 2017. Peguam pemaju telah menyerahkan dokumentasi pinjaman untuk pelaksanaan kepada pembiaya pada 12 Mei 2017, tetapi pembiaya enggan menandatangani dokumen pinjaman tersebut dan mengembalikannya kepada peguam pemaju kerana peguam pemaju telah memberikan carian tanah yang 'tamat tempoh' kepada pembiaya. Peguam pemaju hanya berjaya mengemukakan carian tanah yang sepatutnya pada 26 Mei 2017 dan pada

masa tersebut, pengeluaran wang pinjaman tidak dapat dibuat dalam masa yang ditetapkan oleh pemaju. Pemaju membawa perkara tersebut ke Tribunal Tuntutan Pembeli Rumah ('responden kedua') untuk menuntut faedah pembayaran lewat ('FPL') terhadap perayu atas kelewatan pengeluaran pinjaman oleh pembiaya untuk bil kemajuan pertama yang dikeluarkan oleh pemaju. Responden kedua membuat keputusan yang memihak kepada pemaju dan mengenakan FPL terhadap perayu ('award tersebut'). Terkilan dengan award tersebut, perayu telah memfailkan permohonan semakan kehakiman tetapi Mahkamah Tinggi telah menolak permohonan tersebut atas alasan-alasan berikut: (a) perayu telah mengakui kelewatan pengeluaran tersebut kerana dia hanya menyalahkan orang lain atas kelewatan tersebut; (b) perayu bertanggungjawab sama untuk memastikan pembiaya mengeluarkan jumlah pinjaman dalam masa yang ditetapkan kerana bil kemajuan pemaju telah disalin kepada perayu; (c) tuntutan pemaju untuk FPL kekal sah walaupun notis pendek hanya 18 hari tempoh notis (bukannya keperluan tempoh notis 21 hari untuk menuntut FPL seperti yang dinyatakan dalam PJB); dan (d) perkara tersebut boleh dirundingkan untuk penyelesaian jika bukan kerana keengganan perayu yang tidak munasabah untuk menandatangani penepian dan penyelesaian untuk membenarkan pembiaya menyerap FPL tersebut ('rundingan penyelesaian'). Tidak berpuas hati dengan keputusan Mahkamah Tinggi, perayu memfailkan rayuan semasa.

Diputuskan, membenarkan rayuan, dan mengenepikan keputusan Mahkamah Tinggi dan award responden kedua dengan kos sebanyak RM7,000 di sini dan di bawah tertakluk kepada alokator, dibayar oleh responden pertama kepada perayu:

(1) Sebagai peraturan am, mahkamah tidak sepatutnya merampas atau menceroboh bidang kuasa mana-mana tribunal dan meneliti kandungan atau merit keputusan tribunal. Dan batasan ini harus dipatuhi dengan tahap kewaspadaan dan kekangan yang tertinggi. Walau bagaimanapun, cabaran ke atas kandungan (tertakluk kepada pengehadan mana-mana statut atau peruntukan khusus dan matriks fakta kes tertentu) masih boleh dilakukan jika kesilapan keputusan tersebut cukup mendalam sama ada menyalahi undang-undang, tidak rasional (atau tidak munasabah), tidak wajar dari segi prosedur, atau tidak setimpal. Dalam kes ini, mahkamah mendapati bahawa keputusan hakim Mahkamah Tinggi yang bijaksana sememangnya terkhilaf kerana tidak menemui ketidakrasionalan, menyalahi undang-undang, dan ketidakwajaran prosedur yang jelas bagi award responden kedua yang disangkal. Mahkamah seterusnya mendapati bahawa analisis hakim yang arif telah menyimpang daripada, dan malangnya terlepas intipati sebenar pertikaian dalam kes ini. Hakim yang arif juga telah secara salah mempertimbangkan dokumen 'tanpa prasangka' yang menyalahi

undang-undang untuk dipertimbangkan dalam membuat keputusan (lihat perenggan 20 & 22).

(2) Mahkamah mendapati bahawa hakim yang arif mahupun responden kedua tidak pernah memulakan apa-apa pencarian fakta dan analisis bermakna mengenai kapasiti wakil peguam pemaju yang jelas bertindak untuk pemaju dan bukan untuk perayu mahupun pembiaya. Selanjutnya, hakim yang arif dan responden kedua telah jatuh ke dalam ketidakwajaran kerana tidak memulakan apa-apa perbincangan dan analisis yang bermakna tentang proses dan prosedur dokumentasi pinjaman yang telah menyebabkan kelewatan yang disebabkan oleh peguam pemaju. Di samping itu, melalui agensi, kelewatan peguam pemaju juga merupakan kelewatan pemaju sebagai prinsipal. Oleh itu, kelewatan peguam pemaju dalam menyediakan dokumentasi pinjaman juga berpunca daripada pemaju itu sendiri dan adalah tidak rasional bagi pemaju untuk mengenakan FPL terhadap perayu atas kelewatan yang disebabkan oleh pemaju itu sendiri (dan peguam pemaju). Mahkamah mendapati bahawa tiada orang yang waras yang mengetahui fakta dan isu di atas, akan mendapati bahawa perayu bersalah atas kelewatan yang berpunca atau disebabkan oleh peguam pemaju dan pemaju itu sendiri. Dalam kegagalan untuk membuat penemuan dan pemerhatian yang sama, keputusan hakim yang arif dan award responden kedua yang disangkal pastinya tidak rasional (lihat perenggan 24, 26, 28 & 32–34).

(3) Penemuan dan pertimbangan hakim yang arif mengenai rundingan penyelesaian tersebut jelas bertentangan dengan undang-undang yang mantap tentang larangan membangkitkan dan merujuk kepada dokumen mengenai rundingan 'tanpa prasangka' untuk penyelesaian. Hakim yang arif telah gagal untuk menghargai dan menegakkan undang-undang mengenai ketidakbolehterimaan dokumen 'tanpa prasangka'. Walau apa pun, adalah sangat tidak adil dan tidak munasabah untuk mendesak perayu menandatangani penepian menyeluruh untuk menepikan semua tuntutan lain yang mungkin dia ada terhadap pemaju dan peguam pemaju hanya untuk membolehkan bank menyerap FPL yang timbul disebabkan oleh kelewatan peguam pemaju dan pemaju (lihat perenggan 36–38).

(4) Hakim yang arif mendapati bahawa permintaan pemaju untuk FPL sememangnya tidak mematuhi keperluan tempoh notis 21 hari bekerja (dari tarikh penerimaan bil kemajuan) untuk pemaju menuntut FPL. Walau bagaimanapun, hakim yang arif tidak pernah memulakan penilaian substantif tentang kesan permintaan pramatang tersebut dan ketidakcukupan tempoh notis di bawah kontrak. Permintaan pramatang boleh bermakna bahawa tuntutan FPL tersebut adalah berdasarkan permintaan atau tuntutan yang tidak lengkap. Hakim yang arif mahupun responden kedua tidak membincangkan kemungkinan

kesesuaian prosedur bagi permintaan FPL tersebut. Mahkamah mendapati bahawa keputusan hakim yang arif dan award responden kedua yang disangkal telah termasuk ke dalam kekhilafan yang boleh dirayu memandangkan keseluruhan wacana kritikal tentang kesesuaian prosedur tuntutan FPL tidak terdapat dalam alasan penghakiman hakim yang bijaksana dan award responden kedua yang disangkal (lihat perenggan 40–42).]

Cases referred to

Malayan Banking Bhd v Foo See Moi [1981] 2 MLJ 17, FC (refd)
Pentadbir Tanah Daerah Petaling v Swee Lin Sdn Bhd [1999] 3 MLJ 489, CA (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (refd)
Sunway University College v Mahkamah Perusahaan Malaysia & Anor [2019] 3 MLJ 749, CA (refd)
Wong Kiong Hung & Anor v Chang Siew Lan (f) [2009] 4 MLJ 183, CA (refd)

Appeal from: *Teoh Kok Seng v Heesland Sdn Bhd & Ors* [2022] MLJU 189 (High Court, Penang)

Loh Cien Zen (Zen, Chyuan & Farliza) for the appellant.
Tee Tai Tzian (with Lee Lin Jun) (Tee Tai Tzian & Sim) for the first respondent.

Azimah Omar JCA:

BACKGROUND FACTS

[1] The present appeal before us is an appeal against the High Court's dismissal of the appellant's judicial review application against the Tribunal Tuntutan Pembeli Rumah ('the second respondent/TTPR') to impose late payment interest ('LPI') against one Teoh Kok Song ('the appellant/purchaser') for the delay in the disbursement of the financier's loan for the first progress billing issued by Heesland Sdn Bhd ('the first respondent/developer').

[2] It is the appellant's case that he had been unlawfully imposed the LPI for delays that he had no hand in at all. On the contrary, the first respondent merely adopted a deflective stance (not against the appellant) but to blame the delay against the solicitors' firm, Messrs Ong and Partners who the first respondent insisted were representing the financier and not them, the developer.

[3] For a better understanding of the matter at hand, it is necessary to set out the facts of the case that has led to the present appeal.

A **[4]** The appellant had purchased a double-storey house from the developer ('first respondent'). The firm of solicitors who were appointed and retained by the developer to undertake the sale and purchase and loan application for the purchase is one Messrs Ong and Partners ('the developer's lawyers').

B **[5]** The appellant had expeditiously signed the sale and purchase agreement on 14 April 2017 ('the SPA'). The SPA was only later dated and stamped on 2 May 2017. By this juncture, the procession of the loan documentation and disbursement of the loan sum *is by and large out of the appellant's hands and control*.

C **[6]** The appellant obtained a loan facility from RHB Bank ('the financier') to partly finance the purchase. Accordingly, the financier issued a letter of notification on 18 April 2017. Only after this letter of notification that the developer's lawyers began to prepare the loan documents on 2 May 2017.

D **[7]** The developer (the first respondent) on the same day ie on 2 May 2017 had issued its progress billing for the disbursement of RM530,000 to the financier, which allegedly falls due on *26 May 2017*. The progress billing was issued to the financier and was indicated to have been copied to the appellant. However, no proof of actual issuance or receipt of the same progress billing to the appellant were ever furnished by the first respondent.

E **[8]** In any case, the developer's lawyers had only *18 working days* (between 2 May 2017 to 26 May 2017) to ensure that the financier disburses the loan sum within the developer's own set timeline. Unfortunately, the developer's lawyers had only submitted the loan documentation for execution to the financier on 12 May 2017. Thus, there was already a gap of ten days and now there is *only eight working days' period left* for the financier to process the loan documentation and disburse the loan within time.

F **[9]** To no fault of the appellant, the financier on 18 May 2017 had refused execution of the loan documentations for the reason that the developer's lawyers had given an 'expired' land search which had gone beyond one month in time. The loan documentations were returned unexecuted to the developer's lawyers on 24 May 2017. *Only on the last date on 26 May 2017* did the developer's lawyers finally send the appropriate land search to the financier.

G **[10]** Considering it was already the last day for disbursement of the loan, it was patently obvious that disbursement of the loan certainly could not have been made within the time set by the developer ie *26 May 2017* (although to no fault of the appellant at all).

H **[11]** To no fault of the appellant yet again, the delay was further exacerbated

I

by the delay between the Lembaga Hasil Dalam Negeri's ('LHDN') notice of assessment and the payment of stamp duty by the developer itself. LHDN had issued its notice of assessment on 13 June 2017. *Only after almost a month* since then, on 7 July 2017 that the developer paid the stamp duty of the memorandum of transfer to LHDN.

[12] All these delays (to no fault of the appellant) of course had a domino effect which caused the ultimate delay in the disbursement of the loan by the financier.

[13] We are most minded that *the factum and chronology of delay above is largely consistent between (and admitted by) both the appellant and first respondent-developer*.

[14] Notwithstanding, the first respondent insisted to claim for LPI against the appellant for the delays that were occasioned by the developer's lawyers.

[15] Consequently, the appellant took the matter before the second respondent whereby the second respondent *without any written grounds* have agreed with the developer's imposition of LPI against the appellant of *RM10,020.61* vide an award dated 28 June 2019 in Claim No TTPRZU/B/0030/19 ('the impugned award').

[16] In protest against the impugned award, the appellant filed a judicial review application in the Penang High Court on 3 September 2019 to reverse the impugned award ('JR application').

THE HIGH COURT'S FINDINGS

[17] We have examined the learned judge's grounds of judgment. From the outset, we are pressed to remark that the learned judge's analysis was too bare and has not at all embarked on meaningful examination of the processes and procedures involved in the preparation of the loan documentations which led to the delayed disbursement of the loan by the financier. Neither was there any meaningful mention of the delays occasioned by the developer's lawyers and *nor was there any meaningful deliberation on the representative capacity of the developer's lawyers.* The learned judge unfortunately has misconstrued the true essence of the dispute.

[18] Instead, the learned judge had misdirected herself and dismissed the JR application on the following bare grounds:

(a) the appellant had admitted to the delay of disbursement because he had only blamed others for the delay:

> ... the Applicant has not at all denied the delay in payment ... but alleges that such delay was not his fault but that of others.

(b) the appellant was equally responsible to ensure the financier releases the loan sum within time as the appellant was also a recipient who was copied the developer's progress billing:

> However, as I have indicated earlier, whilst they were sent to the bank as financiers, *they were copied to the Applicant*.

(c) the developer's claim for LPI remains valid despite the short notice of only 18 days' notice period (instead of the SPA's 21 days' notice period requirement to claim late payment interest):

> ... it does appear that the due date stated of 26 May 2017 was indeed not 21 working days from 2 May 2017. However, the issue is whether or not this renders the progress billing/notice of completion invalid. In my view, it does not ... if at all there was some miscalculation in the number of working days, this only means that the amount of late payment interest to be charged should be reduced accordingly.

(d) the matter could have been negotiated for settlement if not for the appellant's unreasonable refusal to sign a waiver and settlement to allow the financier to absorb the LPI:

> ... the financier RHB Bank had agreed to pay the same to settle the claim in full. However, a request was made for a letter of release from the Applicant but since the Applicant refused to give such a letter of release, RHB did not make the payment for such late payment charges.

THE APPEAL BEFORE US

[19] We are minded that the parameter of a general judicial review application (subject to the limitations that may be prescribed under any specific statute and a given case's factual matrix) can either be illegality, irrationality, disproportionality, and procedural impropriety. By and large, a general judicial review application should be concerned on the decision-making process, and not the substance of the decision itself.

[20] As a general rule, the courts ought not to usurp or encroach the jurisdiction of any tribunal and dive into the substance or merits of a tribunal's decision. And this limitation should be observed with the highest degree of vigilance and restraint. Nonetheless, a challenge on substance (again, subject to the limitation of any specific statute or provision and the factual matrix of a given case) may still be mounted if the decision's errors were sufficiently profound to be either illegal, irrational (or unreasonable), procedurally improper, or disproportionate. These strictly qualified and limited exceptions have first been elucidated by the Federal Court in *R Rama Chandran v The*

Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147: A

> It is often said that judicial review is concerned not with the decision but the decision-making process ...
>
> But Lord Diplock's other grounds for impugning a decision susceptible to judicial review make it abundantly clear that such a *decision is also open to challenge on grounds of 'illegality' and 'irrationality' and, in practice, this permits the courts to scrutinize such decisions not only for process, but also for substance*. B
>
> In this context, it is useful to note how Lord Diplock (at pp 410–411) defined the three grounds of review, to wit, (i) illegality, (ii) irrationality, and (iii) procedural impropriety. This is how he put it: C
>
> > By *'illegality'* as a ground for Judicial Review I mean that the *decision maker must understand directly the law that regulates his decision making power and must give effect to it* ...
> >
> > By *'irrationality'* I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223). It applies to *a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it*. D
> >
> > I have described the third head as *'procedural impropriety'* rather than *failure to observe basic rules of natural justice or failing to act with procedural fairness towards* the person who will be affected by the decision. E

[21] But we are thoroughly minded that Lord Diplock's exceptions should only be invoked sparingly and with utmost restraint. It should only be invoked when the impugned decision was thoroughly erroneous (to the high extent of being illegal, irrational, disproportionate, or procedurally improper) that the courts could only do justice by intervening into the tribunal's merits in its decision. This due caution and restraint were restated by the eminent Tengku Maimun JCA (now Chief Justice of Malaysia) in the case of *Sunway University College v Mahkamah Perusahaan Malaysia & Anor* [2019] 3 MLJ 749: F G

> [30] In *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147, the Federal Court in a majority decision held, inter alia, that in judicial review proceedings, the courts have the powers to review the decision of a tribunal on the merits; to substitute a different decision in place of the tribunal's decision without remitting it to the tribunal for re-adjudication; and to order consequential relief. This majority judgment has been affirmed by the Federal Court in *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789; [1997] 2 CLJ 11 and *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625. H
>
> [31] *However*, as observed by the Federal Court in Nik Ramli, *not every case is amenable to the Rama Chandran approach. It depends on the factual matrix of the case and it certainly is a matter of judicial discretion of the reviewing judge*. The Federal Court in *Nik Ramli*, had also stated that although a reviewing judge might not have come to the same conclusion from the established facts, *the judge should exercise* I

restraint and should not disturb such finding unless it could be shown that the finding was based on grounds of illegality or plain irrationality.

[22] In view of the precedents above, we have identified that indeed the learned judge's decision has fallen into error in not finding the obvious irrationality, illegality, and procedural impropriety of the second respondent's impugned award. We also identified that the learned judge's analysis has strayed away from, and unfortunately missed the true essence of the dispute. The learned judge had also wrongfully considered 'without prejudice' documents which were illegal to be considered in making a decision:

(a) IRRATIONALITY: the learned judge was wrong in failing to find that the second respondent's impugned award was irrational for blaming the delay against the appellant;

(b) ILLEGALITY: the learned judge's analysis and reliance upon 'without prejudice' correspondences were unlawful/illegal; and

(c) PROCEDURAL IMPROPRIETY: the learned judge was wrong in failing to find that the second respondent's impugned award was procedurally improper in view of the pre-maturity of the LPI claim.

Irrationality: The learned judge was wrong in failing to find that the second respondent's impugned award was irrational for blaming the delay against the appellant

[23] By Lord Diplock's threshold of irrationality, indeed a sensible person who has applied his mind to the facts and involvement of the developer's lawyers would have never blamed the appellant for any of the delays occasioned which were beyond the appellant's control.

[24] First and foremost, neither the learned judge nor the second respondent ever embarked on any meaningful fact finding and analysis on the representative capacity of the developer's lawyer. This identification was of pinnacle importance as all parties in their respective submissions were of the same mind on the developer's lawyers' delays but were at extreme odds on the representative capacity and agency of the developer's lawyers.

[25] The appellant contended that the developer's lawyers were retained, appointed, and paid for the sake of the developer. On the contrary, the first respondent-developer insisted that *the developer's lawyers only act for the developer in preparation of the SPA,* but *was acting for the financier in the loan documentation process.* Despite this critical disputation, this issue was entirely absent in both the learned judge's decision and the second respondent's impugned award.

[26] To our mind, we find that the developer's lawyers obviously was acting in the representative capacity of the developer and not the appellant nor the financier. Notwithstanding the nomenclatures and isolating terms, the first respondent might employ to demarcate the scope of the developer's lawyers' duties, it is plain and obvious to see that Messrs Ong and Partners was appointed by the developer to see to the successful sale and purchase of the property to the appellant (which included both the preparation of the SPA and the process of loan documentation).

[27] This is for the simple factum that neither the appellant nor the financier had the option or discretion to choose which firm or lawyer to undertake the loan documentation. It is via the developer's appointment of the developer's lawyers for the SPA preparation, that the developer's lawyers were also appointed to be the lawyers entrusted by the developer to prepare the loan documentation. It is too far-fetched for the developer to make such a demarcation between 'SPA Solicitors' and 'Loan Solicitors' considering that there was only one singular Messrs Ong & Partners (who was already appointed by the developer) that undertook both the preparation of the SPA and loan documentation. It is not as though that the appellant or the financier were given any room to appoint their own solicitors to undertake the loan documentation.

[28] Apart from failing to analyse the representative capacity and the involvement of the developer's lawyers, the learned judge and the second respondent had fallen into irrationality in not embarking on any meaningful deliberation and analysis of the process and procedures of the loan documentation which had led to the delay occasioned by the developer's lawyers.

[29] There was not an iota of mention of the developer's lawyers furnishing an 'expired' land search which did not meet the financier's requirement (which caused the disbursement of the loan to be impossible to be made within time). There was also not any mention of the developer's own delay in paying the stamp duty after LHDN's issuance of its notice of assessment.

[30] Instead, the learned judge went down an entirely different tangent in blaming the appellant on the ground that the appellant was also copied the progress billing by the first respondent-developer. This finding and tangent was irrational simply for the facts that:

(a) it was admitted during the appeal hearing that apart from the progress bill indicating a 'cc' to the appellant, there was no other proof of issuance by the developer, and no other proof of receipt that the appellant indeed received the developer's progress billing; and

(b) even if the progress billing was indeed copied to the appellant, the entire conduct and undertaking of the loan documentation process was entirely beyond the appellant's hand and control. The pace and procession of the loan documentation was entirely under the purview of the developer's lawyers.

[31] Furthermore, instead of discussing the above harrowing issues, the learned judge embarked on the tangent of the validity of the developer's LPI claim despite the pre-maturity of demand (due to insufficient notice period) that was not in compliance with cll 4 and 9 of the SPA.

[32] And by agency, the developer's lawyers' delays were also the developer's delays as principal. Thus, apart from the developer's own delay in paying the stamp duty, the developer's lawyers delay in preparing the loan documentation is also attributable to the first respondent-developer itself. We agree with the appellant's reference to the Court of Appeal decision in *Wong Kiong Hung & Anor v Chang Siew Lan (f)* [2009] 4 MLJ 183:

> [16] On the capacity of an agent, it is noteworthy that the SPA expressly stated that the vendors had appointed JL Lim & Co as their solicitor to whom the vendors had paid the fees and costs. *A solicitor who has been retained by his client and whose fees and costs are paid by his client is in law and in fact the agent of the client*: *See Abu Bakar bin Ismail & Anor v Ismail bin Husin & Ors and other appeals* [2007] 4 MLJ 489; [2007] 3 AMR 257 at pp 273 and 274 at para [24].

[33] Thus, the fault or liability for the delay of the developer's lawyers is an issue that is exclusively between the developer and the developer's lawyers. Never at any point in time was the delay attributable to the appellant. As far as the appellant is concerned, it is irrational for the developer to impose LPI against the appellant for the delay that the developer itself (and the developer's lawyers) have caused. This is in line with the trite principle that no party ought to be allowed to stake a case or defence based on its own default upheld by Justice Gopal Sri Ram JCA (as His Lordship then was) in the case of *Pentadbir Tanah Daerah Petaling v Swee Lin Sdn Bhd* [1999] 3 MLJ 489:

> *There is a principle of great antiquity that a litigant ought not to benefit from its own wrong. Although of universal application*, it has been restated when applied to a particular context. For example, the principle when applied in the context of the law of contract may be formulated as follows: *a party ought not to be permitted to take advantage if his own breach*. See *Alghussein Establishment v Eton College* [1988] 1 WLR 587 *New Zealand Shipping Co Ltd v Societe Des Ateliers Et Chantiers De France* [1919] AC 1.
>
> *But as I have said, the principle is of universal application.* In the context of the present case, that principle produces the following result. A land owner who has erected a building on his land contrary to law ought not to receive any benefit from it from an acquiring authority under the Act.

[34] All of the above under this heading considered, it is patently clear to us that no sensible person having the knowledge of the above facts and issues, would ever find that the appellant was at fault for the delays occasioned or caused by the developer's lawyers and the developer itself. In failing to make the same finding and observation, the learned judge's decision and the second respondent's impugned award were certainly irrational.

Illegality: The learned judge's analysis and reliance upon 'without prejudice' correspondences were unlawful/illegal

[35] Part of the learned judge's decision was premised on the appellant's 'reluctance' to simply settle the claim as per the negotiated settlement where the financier offered to absorb the LPI claimed by the first respondent (subject to the appellant's blanket waiver of any further claims against the financier, the first respondent-developer, and the developer's lawyers).

[36] The learned judge's finding and consideration of the negotiated settlement clearly contravened the trite law against raising and referring to documents regarding 'without prejudice' negotiations for settlement. The learned judge insinuated that the appellant was being difficult and unreasonable in refusing to sign a waiver (to waive any further claims against the financier, developer, and developer's lawyers) in consideration of the financier's offer to absorb the LPI. But these were all allegedly 'without prejudice' documents. The learned judge did not at all deliberate on whether or not these documents were 'without prejudice' documents for the learned judge to legally rely upon. Suffice that we refer to the Federal Court decision in *Malayan Banking Bhd v Foo See Moi* [1981] 2 MLJ 17:

> *It is settled law that letters written without prejudice are inadmissible in evidence of the negotiations attempted*. This is in order not to fetter but to enlarge the scope of the negotiations, so that a solution acceptable to both sides can be more easily reached.

[37] As an aside, we are pressed to remark that it would be severely unjust and unreasonable to insist upon the appellant to sign a blanket waiver to waive all other claims he might have against the developer and developer's lawyers just so that the bank would absorb the LPI that was incurred due to the developer's and developer's lawyers' delays. It is far too opportunistic that a blanket waiver be forced upon the appellant that would cover all other forms of damages that the appellant might be entitled in the future just so that the financier can absorb the LPI that was actually incurred by the developer's and the developer's lawyers' delays.

[38] In view of our deliberations above under this heading, we accordingly find that the learned judge's decision had fallen into error for considering 'without prejudice' documents which were inadmissible from the outset. The

learned judge had failed to appropriately appreciate and uphold the law on the inadmissibility of 'without prejudice' documents.

Procedural impropriety: The learned judge was wrong in failing to find that the second respondent's impugned award was procedurally improper in view of the premature demand for the LPI

[39] In view of our first two findings above, the issue regarding the premature LPI demand is already moot as the delay was not the fault of the appellant. Nonetheless, for the sake of completion, we shall swiftly determine this issue.

[40] The learned judge observed that the developer's demand for LPI indeed did not comply with the requirement for 21 working days' notice period (from the date of the receipt of the progress billing) for the developer to demand for LPI. However, the learned judge never embarked on a substantive evaluation of the effect of such premature demand and insufficiency of notice period under a contract. The learned judge merely proceeded to deduct the LPI sum that was supposedly owed (to factor in the three days' short notice in the calculation of the alleged delay).

[41] A premature demand could mean that the LPI claim was based off of a defective demand or claim. Neither the learned judge nor the second respondent-Tribunal discussed the possible procedural propriety of the LPI demand in view of the following hypotheses:

(a) if the LPI claim was premature, could it mean that the LPI claim runs contrary to or was in breach of the terms of the SPA? If so, would the developer be required to issue a fresh LPI demand?

(b) since insufficient notice period was given, would the insufficiency have deprived the appellant his rightful contractual period of time to remedy his default (if any)? and

(c) since the LPI claim was premature and insufficient notice period was given, would the pre-maturity of the claim and insufficiency of notice render the LPI claim to be procedurally impaired?

[42] Notwithstanding, it is unnecessary for us to determine these questions at this juncture but it would be remiss if we do not highlight the absence of any meaningful analysis of this issue within the learned judge's decision and the second respondent's impugned award. Suffice that we find that the learned judge's decision and the second respondent's impugned award had fallen into an appealable error considering that the entire critical discourse of the procedural propriety of the LPI demand was absent in the learned judge's grounds of judgment and the second respondent's impugned award.

THIS COURT'S DECISION

[43] All of the above deliberations considered, we unanimously find that, on the balance of probabilities that there are merits in the present appeal. Thus, we allow the present appeal. Therefore, the learned judge's decision, findings, and orders are hereby set aside.

[44] We also accordingly allow the appellant's judicial review application and set aside the second respondent's impugned award in Claim No TTPRZU/B/0030/19 dated 28 June 2019. The appellant should not be blamed for the delays nor be liable to any payment of LPI as claimed by the first respondent.

[45] We also order that the first respondent do pay the appellant costs of RM7,000 here and below, subject to allocator.

Appeal allowed; High Court's decision and second respondent's award set aside with costs of RM7,000 here and below subject to allocator, to be paid by first respondent to appellant.

Reported by Dzulqarnain Ab Fatar